No. 556

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

CITIES SERVICE GAS COMPANY, a corporation, *Petitioner*,

v.

FEDERAL POWER COMMISSION; PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI; the CITY OF KANSAS CITY, MISSOURI; STATE CORPORATION COMMISSION OF KANSAS; and CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, *Respondents*.

On Petition for Rehearing on the Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE, AND BRIEF AMICUS CURIAE ON THE PETITION FOR REHEARING OF

INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, AMICUS CURIAE.

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

The Independent Petroleum Association of America, by its General Counsel, moves this Honorable Court for leave to file, as *amicus curiae,* the accompanying brief on the petition for rehearing filed herein. The written consent of all the parties to this proceeding, with the single exception of the City of Kansas City, Missouri, which is not an original party hereto, have been obtained.

Respectfully submitted,

RUSSELL B. BROWN,
General Counsel,
Independent Petroleum
Association of America.

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On Petition for Rehearing on the Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

BRIEF ON THE PETITION FOR REHEARING.

This brief of the Independent Petroleum Association of America is presented *amicus curiae*, under Rule 27, paragraph 9, of the Rules of the Court.

The judgment of this Court denying the petition for writ of certiorari was entered herein on November 12, 1946. This brief is in support of the petition for rehearing.

PRELIMINARY STATEMENT.

The Independent Petroleum Association of America (hereinafter referred to as IPAA) is a corporation organized and existing under the laws of the State of Oklahoma.

The IPAA is a national association of independent producers of crude petroleum and natural gas, independent refiners of petroleum, independent transporters of crude petroleum or its products or natural gas through pipe lines, owners of oil or gas royalties, land owners, permit holders, drilling contractors, and independent distributors of petroleum products or natural gas. Every oil and gas producing state of the nation is represented in the membership of the Association.

The IPAA, the membership of which as above stated includes, inter alia, producers of natural gas and royalty and land owners of natural gas, has a direct and immediate interest in this proceeding. And its interest is not confined to its members concerned solely with natural gas. The interest of IPAA stems from each and every one of its approximately 6,000 members whether concerned with *gas* or *oil*. The oil industry, being so inherently related chemically, physically and geologically to the gas industry, also directly and immediately is concerned. Due to this inherent relationship of the *oil* and *gas* industries, any action affecting the "production or gathering" of one necessarily and inescapably extends back into or affects the other. It follows therefore that the entire membership of IPAA is affected and interested. And theirs is not a passive interest. Only recently the membership, in their seventeenth annual meeting held in Fort Worth, Texas, October 28–30, 1946, had occasion to consider and take overt formal action on the specific issues argued in this brief. The contentions advocated herein strictly conform to the action so taken by the membership. And this interest and concern on the part of the membership of the IPAA is not an incipient one. It is one that has developed through vigilant surveillance of the administration of the Natural Gas Act since its enactment. In the first case (1940), viz, The Columbian Fuel Corporation Case,[1] before the Commission in which was presented the issue argued herein relative to "production

[1] Columbian Fuel Corporation, 2 FPC 200, 35 P.U.R. (N. S.) 3.

or gathering", the IPAA participated. Since that case the IPAA on several occasions has considered its interests as affected by the administration of the Natural Gas Act and has culminated such considerations in its recent action at its seventeenth annual meeting referred to above.

It is submitted, therefore, that the IPAA has a material and very substantial interest in the adjudication of the issues presented in this proceeding.

STATEMENT OF THE CASE.

The decision of the Court of Appeals below presents to the Court the following circumstances which are dealt with herein and are submitted as compelling reasons why the writ for certiorari should be granted.

1. A new and novel issue not heretofore before this court involving the jurisdiction and applicability of a Federal statute. (See "SUMMARY OF ARGUMENT" Page 16)

2. Existing uncertainty and confusion resulting from the administration of the law (a federal statute) and the decisions of the courts demand the attention of this Court. (See "REGULATION OF PRODUCING AND GATHERING OF NATURAL GAS," Page 9)

3. The fears and hallucinations of the Court of Appeals below have prescribed the jurisdictional limits of the law involved rather than the plain language of Congress. (See "EXERCISE OF AUTHORITY OVER THE CITIES SERVICE OIL COMPANY", Page 14)

4. The decision of the Court of Appeals below sanctions a capricious and flaunting disregard of the intent, purpose and scope of the law. (See "EXERCISE OF AUTHORITY OVER THE CITIES SERVICE OIL COMPANY", Page 14)

5. The decision of the Court of Appeals below, if permitted to stand, will change the entire economic base on which the oil and gas industries have been built. (See Page 8)

6. The decision of the Court of Appeals below, if permitted to stand, would be to permit an errant court

to give effect to the grasping impulse of an over-ambitious bureau which unchecked, changes our form of Government without legislative sanction and in direct conflict with legislative expression. (See Page 8)

This proceeding involves the validity of an order of the Federal Power Commission (hereinafter referred to as the Commission), entered on July 28, 1943, requiring the Cities Service Gas Company (hereinafter referred to as Petitioner) to reduce its rates for the transportation and sale of natural gas. The rate base from which the reduction was determined included, inter alia, the production and gathering facilities of the Petitioner and, in addition, the Commission also exercised regulatory authority over the natural gasoline extraction plants of Cities Service Oil Company, an affiliate of but a separate operating and corporate entity from the Petitioner.

The decision of the Court of Appeals below insofar as it goes in upholding as properly within the jurisdiction of the Commission the producing and gathering properties and facilities of the Petitioner, has found support from some quarters on the premise that the Petitioner otherwise is a "natural gas company" and subject to the jurisdiction of the Commission. If this decision below or the pertinent decisions of this Court were clear and precisely to this end then those in the producing and gathering phase of the oil and gas industries who are *not* otherwise a "natural gas company" and therefore not subject to the jurisdiction of the Commission, could take solace in such jurisdictional limitation. But the opinion below does not stop there. The opinion below as an analysis clearly reveals, is an outright and complete repudiation of the Congressional mandate prescribing the exemption of "production or gathering." The opinion below does not stop with the inclusion, within the sanctioned jurisdiction of the Commission, of the "producing and gathering" properties of the Petitioner but, in addition, the opinion below reaches out and breaches all jurisdictional limitations and grasps the property of a separate corporate entity which clearly and ad-

mittedly is not otherwise a "natural gas company." Wherein then can *any* oil or gas producer or gatherer, or driller, or land owner, or royalty owner, or transporter, or refiner or processer, even though he is *not* "otherwise a natural gas company", who has any relationship or dealings whatever with a "natural gas company", find escape from the usurping authority of the Commission. This is a step by step by step creeping process whereby the Commission, with the sanction of the courts, is extending its jurisdiction into forbidden fields. Viewed in light of the clear, unequivocal and precise legislative limitations prescribed in the Act this is jursdictional extension on the rampant. This is the process which is the cause of the fear which already has manifested itself within the oil and gas industries. Producers refuse to contract for sale of gas lest they be declared "natural gas companies" or for other reason declared subject to the jurisdiction of the Commission. The economic results of this process of the Commission is compelling producers and processors to "flare" their gas so as to avoid the destructive effects of being subjected to the Commission's jurisdiction. This course not only compels waste but destroys incentive to develop the oil and gas resources vital to our peacetime as well as wartime economy. And this process is being permitted to continue at a time when incentive should be its highest, when every individual effort is imperative not only to reconvert a war-worn economy but as is so earnestly and persistently advocated from so many quarters of our government, to prepare our economy for another not improbable emergency. Yet, here the Court of Appeals below has sanctioned a process whereby the Commission has exercised (1) rightful or proper jurisdiction over the "natural gas company" activities of Petitioner, plus, (2) improper or wrongful jurisdiction over the "production and gathering" activities of the Petitioner which activities are specifically exempted from the Natural Gas Act, plus (3) improper and wrongful jurisdiction over a stranger party to the rightful issues involved, viz., the Cities Service Oil Company. The founda-

tional danger lies within the accumulation of jurisdiction embodied within this triple headed jurisdictional malformation. Each of the three parts of this malformation taken separately, and even though afoul of the legislative intent, are bounded by at least some limitations. Together they create a limitless jurisdiction. Together they make entirely meaningless the specific exemption set forth in Section 1 (b) of the Natural Gas Act with respect to "production or gathering."

The practical effect of permitting the opinion of the lower court to stand would be to change the entire economic base on which the oil and gas industries of the United States have been built, from one of free economy to bureauracy control. An errant court has given effect to the grasping impulse of an over ambitious bureau which unchecked, changes our form of Government without legislative sanction and in direct conflict with legislative expression. A process with these earmarks cannot be tolerated under our form of government. It must be stopped. It is now appropriate for this Court to exercise judicial correction. It is to this end that this brief is addressed.

It is submitted that the above is a summary of the fundamental jurisdictional questions presented by this cause together with a cursory reference to the profound economic aspects of the issues.

ARGUMENT.

The issues to be argued in this brief are raised by Petitioner's Questions No. 2, No. 3 and No. 5.[1] The specific issues dealt with herein briefly may be summerized as follows:

I. Regulation of Production and Gathering of natural gas, including the related issues of (a) the impropriety of applying the public utility theory of rate-making to the production and gathering phase of the natural gas industry, and (b) the impropriety of the "cost" method of evaluation applied by the Commission,

[1] See Petition for Writ of Certiorari, Pages 6, 7 and 11.

II. Exercise of Authority over the Cities Service Oil Company.

These issues herein will be argued separately to the conclusion that the Court of Appeals below has erred in its decision with respect to each separately. The more important and overriding question presented to this Court, however, evolves from the joint results and effects of the decision below on these separate issues. These issues taken jointly, under the decision below, vitiate in their entirety the legislative prohibitions excluding "production or gathering" from the Commission's jurisdiction. Section 1 (b) of the Natural Gas Act thereby is voided.

This "Argument" is designed to supplement the Petitioner's presentation of the issues involved. The confinement of this argument to the issues enumerated above does not mean that the IPAA is not in sympathy with the other questions raised by Petitioner or that such questions do not present profound issues which warrant review by this Court. On the contrary these other issues involve the fundamental right and true meaning and scope of "judicial review" and other matters of substantive importance to the oil and gas industries.

I. Regulation of Production and Gathering of Natural Gas.

The Commission in this proceeding included all the production and gathering properties and facilities of the Petitioner in the rate base upon which its rate reduction order was founded. This procedure presents three issues: (1) The legal interpretation of the language of the Natural Gas Act in order to determine the jurisdiction, if any, conferred upon the Commission over "production or gathering"; (2) Assuming that the Act confers jurisdiction over the "production or gathering" activities of a "natural gas company" the issue then is the legal and practical sufficiency of the procedure of including the production and gathering properties and facilities of Petitioner as an in-

herent part of the rate base, that is, the impropriety of applying the public utility theory of rate-making to the production and gathering phase of the natural gas industry; (3) The impropriety of the "cost" method of evaluation applied by the Commission to natural gas production, reserves and leaseholds.

First—The legal interpretation of the language of the Act. The Act does not vest the Commission with unlimited jurisdiction over the natural gas industry. Limitations are specifically set forth. In the declaration of the policy of the Congress appearing in the first paragraph of the Act the Congressional objection clearly is revealed as protection of the public in the *ultimate distribution* of natural gas. In Section 1 (b) of the Act Congress prescribed the jurisdiction of the Commission. This is a precise definition plainly specifying certain areas wherein jurisdiction under the Act does not reach. One such excluded area is "production or gathering" of natural gas. This exemption of "production or gathering" is not a partial exemption. There is no limiting word or phrase appended to this exemption. It is all inclusive. Nowhere in the Act, notwithstanding contentions of the Commission and intimations of some court decisions to the contrary, is there to be found a Congressional attempt to differentiate between "direct" regulation and "indirect" regulation of "production or gathering"—prohibiting "direct" regulation but authorizing "indirect" regulation. Yet in the decision below the Court of Appeals has approved the economic regulation of "production and gathering", as if, economic regulation (1) is not tantamount to total regulation (2) is authorized by language found in the Act.

The Court of Appeals below dismissed this issue by erroneously concluding that it "has already been squarely met and conclusively decided." The pertinent decisions of this Court certainly do not "squarely" meet this issue, with a clear majority in a case where the issue is plainly put. And if the issue is "conclusively" decided by such

decisions it is by accident and not design. If there ever has been a majority of this Court in harmony on this issue as concluded by the court below, it is not recorded in the decisions of this Court. Such a conclusion can find support only through an anomolous, freakish enmeshing and overlapping of opinions—majority, concurring and dissenting—to be found in the pertinent decisions of this Court. A brief analysis reveals the result. In *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, the majority consisted of five Justices of this Court including the late Chief Justice Stone. But in that case the issue here under discussion was not raised. And subsequently the late Chief Justice very clearly pronounced his stand on this issue in his forceful dissent in the related cases of *Colorado Interstate Gas Company* v. *Federal Power Commission* and *Canadian River Gas Company* v. *Federal Power Commission*, 324 U. S. 581. This dissent shows that had the issue been raised in the Hope Case, as is technically required by Section 19 of the Natural Gas Act, the late Chief Justice would not have been with the majority on this issue, leaving this case as *not* an authoritative citation. Also, later we find in the Colorado (Canadian) Cases, *supra*, a four-one-four decision, that Mr. Justice Jackson, concurring, expressly reiterated adherence to his earlier strong dissent in the Hope Case, *supra*, but accepted the Hope decision as a binding authoritative decision of this Court. Its defect as an authoritative decision, *on the instant issue*, has been pointed out.

Under these circumstances can it justifiably be said that the issue here "has already been squarely met and conclusively decided."

In conclusion and with utmost deference it is submitted that the pertinent decision of this Court leave this issue clouded with uncertainty. As a result much time and effort is being wasted by the oil and gas industries in seeking judicial finality. In the absence of a conclusive decision by this Court the Commission, with the sanction of the lower courts, is free to continue its practiced evasions of

the law with extremely adverse repercussions throughout the oil industry as well as the gas industry. A conclusive decision by this Court on this issue even if adverse to the position here advocated, would be, in its finality, a salutary step in removing the uncertainty of a situation that has been developing for eight years, a situation that demands attention and must be removed.

SECOND—The impropriety of applying the public utility theory of rate-making to the natural gas industry. Mr. Justice Jackson's dissenting opinion in the Hope case, *supra,* and concurring opinion in the Colorado (Canadian) Cases, *supra,* so ably and comprehensively cover this matter that, other than cite those opinions, would be to belabor the issue unnecessarily.

THIRD—The impropriety of applying the "cost" theory rather than "value" theory of evaluating current gas production, reserves and leaseholds for inclusion in the rate base. The process applied by the Commission allows the producer or gatherer of gas an interest return on the depreciated historical "cost", so-called, of reserves, producing properties and gathering facilities.

The IPAA is not *immediately* concerned with the Commission's action in this particular proceeding because the hurt is confined temporarily to the one party, the Petitioner. But the consequences of the hurt are not confined. And, therefore, the IPAA becomes extremely concerned with the application of such procedure because of the inevitable drastic industry-wide consequences that are sure to follow.

This practice of the Commission has the amazing effect of according a zero value to large holdings obviously extremely valuable and other instances of according values manifestly inappropriate. Such practice artificially depresses the price of gas throughout the industry, and artificially deters exploratory and development activity. Under this theory the price varies as does the source. Stability within the industry will be unknown. This depressing effect upon price and the entire economics of the industry ines-

capably will permeate the entire oil industry as well as the gas industry. Here, the common denominator for these industries artificially is fixed by fiat and it follows that the economics of these industries will seek this artificial level of its common denominator. The oil and gas industries cannot continue as free enterprise if such unsound regulation of a portion thereof is permitted—which in the end will control the whole.

The "cost" theory as applied by the Commission is in nonconformance with the very nature of the gas industry. Any exploratory or development venture in the gas industry necessarily requires a large margin of risk investment. Such a venture usually involves thousands of acres of land with the understanding that return, if any, on the *entire* investment probably will be realized from only a few of the total acres of land involved. Yet here the Commission ignores these facts and applies a theory that has evolved directly from regulation of public utility activities, in total disregard of the inherent hazards involved in the adventures attendant the development of natural gas reserves—to be contra-distinguishable from the staid, insured, and otherwise protected ventures in public utility activities. It is inconceivable. No industry is less amenable to this theory than the natural gas industry. This practice of the Commission, now sanctioned by the Court below, is inapplicable to the gas industry and ends in irrational and arbitrary results.

The Commission and Court of Appeals below have assumed that this question has been decided by the decisions of this Court. This is without foundation. A majority of this Court has not decided *this issue*. It is submitted, therefore, that the erroneous assumptions of the Court of Appeals below, and the uncertainty and absurd results consequential of the Commission's treatment of this issue warrants review by this Court.

II. Exercise of Authority Over the Cities Service Oil Company.

The Cities Service Oil Company (hereinafter referred to as Oil Company) is a separate corporate entity from the Petitioner, although an affiliate thereof. Like many individuals and other corporate entities in the oil and gas industries, the Oil Company is a processor of natural gas, operating among other activities natural gasoline extraction plants. The Commission segregated these plants from the Oil Company's other properties, ignored the separate corporate entity of the two companies, treated such plants as if they belonged to Petitioner and fixed a return of 6½% on such plants, which plants clearly are not within the jurisdiction of the Commission. This Oil Company is a stranger party to this proceeding and should be treated as such. The Court of Appeals below held that the Commission's exercised authority over the Oil Company was necessary to preclude the "siphoning" off of unjustified profits of the Petitioner. This is an untenable and manifestly erroneous reason. The Court in effect says that the possibility of "siphoning" of profits justifies the Commission in exercising its authority—that such possibility automatically extends the jurisdiction of the Act. Since when have fears and hallucinations of courts prescribed jurisdiction rather than the plain language of Congress recited in the law? This reasoning of the Court of Appeals below would subject all persons, affiliates as well as others, having business dealings with Petitioner, to the authority of the Commission. If Petitioner is determined to circumvent the law it could devise a "siphoning" arrangement with a non-affiliate or independent as readily as with its affiliate. It is conceded that the Commission has the authority and duty to investigate the transactions between Petitioner and others, including affiliates, to assure that such transactions are at arm's length and that the public consumer is not the victim of a "siphoning" arrangement, but this is the limit of the Commission's authority over these matters.

The Court below sustained this action of the Commission on the additional erroneous conclusion that such processing of the natural gas is "essential" to the activities of a "natural gas company". The fallacy here is obvious. If such processing is "essential" then how was it transported 250 miles before being so processed. (R. III, 1125.) Webster's unabridged dictionary in defining the word "essential" uses these descriptions: the essence of something; indispensable; necessary. Can it be said that such processing is the *essence* of transportation or is *indispensable* to transportation or is *necessary* to transportation. The function of transportation as involved here means transference, transmission, or to carry or convey from one place to another. And transportation is the sole physical function, which falls within the jurisdiction of the Act as the following language in Sec. 1 (b), the jurisdictional paragraph, clearly shows:

> this act shall apply to the transportation of natural gas in interstate commerce * * * and to natural gas companies engaged in such transportation * * *

Does such processing act as an impelling force in moving the natural gas, or contribute in any way in carrying or conveying it from one place to another. The activity of natural gasoline extraction is no part of the activity of transportation within any stretch of the meaning or function of these two activities. The activity of extraction is, in fact, an element of the activity of production. Natural gas which is produced in conjunction with petroleum, in its natural reservoir is in a unified solution with the petroleum. In the process of *production* this unified solution escapes to the surface and upon reaching atmospheric pressure certain of the components of this solution drop out as liquid petroleum. Certain of the remaining components of this original solution likewise are reducible to liquified petroleum products upon subjection to the *extraction process* involved here—a process of *producing* petroleum products. If such processing is "essential" to "natural gas com-

pany'' activities under the Act, then logically it can be argued (1) gathering is essential (2) production is essential (3) drilling is essential (4) prospecting is essential, and on to palpable asininity. Great and irreparable injury to an important segment of American industry will result if this Court stands by and permits such flaunting disregard of the intent and purpose and scope of the applicable law.

It is respectfully urged that this Court take cognizance of the practical results of the decision below in sanctioning the Commission to persue its capricious course to an even more farfetched extreme.

III. Summary of Argument.

The decision of the Court of Appeals below, on the two questions argued herein, even though erroneous, at least leaves some limitations upon the authority of the Commission when the effects of the decision with respect to each of said issues is considered separately from the other. But the decision of the two issues, considered conjunctively, removes all jurisdictional limitations from the authority of the Commission with respect to ''production or gathering.'' For example—the decision approving the exercise of authority over the production and gathering properties of Petitioner which is otherwise a ''natural gas company,'' presumably does not approve the exercise of such authority over a producer or gatherer who is *not* otherwise a ''natural gas company'' thereby preserving at least some limitation upon the reach of jurisdiction of the Commission; however, the decision in approving exercise of authority over the Oil Company extraction process, in effect, says that any person engaged in any activity *essential* to the transportation and sale of natural gas who has any dealings whatever with a ''natural gas company'' also is subject to the authority of the Commission, and, as above pointed out, logically the activities of gathering, producing, drilling, prospecting, etc., are even more *essential* to the transportation and sale of natural gas than an extraction plant;

therefore, the effect of the decision of the Court of Appeals below on these two issues, taken conjunctively, is that a producer or gatherer or driller of a well (even though not otherwise a "natural gas company" and presumably exempted from the Act) also is subject to the regulation by the Commission if the gas from his well eventually comes into the possession of a "natural gas company". Thereby, the clear unequivocal exemption of "production or gathering" is rendered entirely meaningless.

In conclusion it is submitted that the decision below on these two issues, taken conjunctively, presents a novel and new issue to this Court, an issue which heretofore has not been raised or decided in a decision of this Court.

CONCLUSION.

The Independent Petroleum Association of America suggests that if the issues were resolved as advocated herein the problem presented to the Commission would be a relatively simple one. Far more simple and economically sound than the procedure now followed. In the case of an integrated company such as Petitioner, the allowance as an operating expense of the going field price for gas at the point of its entrance into the interstate transmission system, and the exclusion of production and gathering properties from the "rate base", would protect every interest of the company, the Commission and the public. With respect to the Commission's treatment of the Oil Company's extraction plants the Commission should review the dealings between the Petitioner and said company to assure that the transactions are at arm's length—and nothing more.

The practices complained of in this brief inescapably impinge on the local situation throughout the oil industry as well as the gas industry by its direct and substantial effects on field prices and upon conservation practices. The issues presented concern not only the statutory limits of the Commission's powers, but reach the basic economy

of the entire oil and natural gas industries.

It, respectfully, is submitted that the present uncertainty and confusion in the law demands the attention of this Court and, therefore, it is urged that the petition for a writ of certiorari be granted.

Respectfully submitted,

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Independent Petroleum Association of America

Dated: At Washington, D. C.
December 7, 1946